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Supreme Court, U.S.
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In the

Supreme Court of the United States

WALTER ROSALES; MARIE TOGGERY;
KAREN TOGGERY,

Petitioners,

v.

KEAN ARGOVITZ RESORTS, INC., a limited liability company; LAKES GAMING, INC., a publicly traded company; KEAN-ARGOVITZ RESORT-JAMUL, LLC, a Nevada limited liability company; LAKES KEAN-ARGOVITZ RESORTS-CALIFORNIA, LLC, a Delaware limited liability company,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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I. THE TRIAL COURT'S ALTERNATIVE GROUNDS FOR DISMISSING THE SECOND AMENDED COMPLAINT, STILL CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL, AND FAIL TO ADDRESS PETITIONERS' CLAIMS UNDER 42 U.S.C. 1985(3).

Contrary to the Respondents unsupported assertion, the lower courts did not independently address Petitioners' 42 U.S.C. 1985(3) claims in the Sixth Claim for Relief of the Second Amended Complaint. AA 44a-45a. The lower courts particularly failed to address the independent allegations of the Respondents' private conspiracy to deprive Indian members of a tribal political faction of their undiluted right to vote in federal tribal elections.

Instead, Petitioners' claims under 42 U.S.C. 1985(3) are addressed in footnote 3 of the District Court ruling, AA 8a, and 14a, wherein District Judge Whalen states: "Plaintiffs cite *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) as controlling Ninth Circuit authority to support their § 1985(3) claim. (See Pls.' Opp'n at 12-14.) However, upon further examination by the Court, Means was decided by an Eighth Circuit panel. The Court is not bound or persuaded by Means and declines to follow its reasoning here." AA 14a. Similarly, the Ninth Circuit merely adopted the District Court's opinion, stating: "for the reasons stated by the district court, we agree that the plaintiffs failed to state a claim upon which relief could be granted." AA 2a.

Contrary to the Respondents' implication, none of Petitioners' other claims for relief in the Second Amended Complaint, AA 21a-48a, are at issue in the petition for certiorari before this Court. In addition, it is clear from the lower courts' ruling, that both courts specifically refused to

follow the Eighth Circuit's opinion in *Means v. Wilson*, *supra*, and refused to find that a private conspiracy to deprive Indian members of a tribal political faction of their right to vote stated a cause of action under 42 U.S.C. 1985(3), which is still in conflict with the decisions of other courts of appeals and district courts, See for e.g., *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975) *cert. denied*, 424 U.S. 958 (1976); *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *mod. on other grounds*, 446 U.S. 754 (1980); *Thompson v. New York*, 487 F. Supp. 212 (N.D.N.Y. 1979); *see also*, *Cameron v. Brock*, 473 F.2d 608 (6th Cir. 1973); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir. 1975); *Keating v. Carey*, 706 F.2d 377 (2nd Cir. 1983); and *Stevens v. Rifkin*, 608 F. Supp. 710 (N.D. Cal. 1984).

II. UNPUBLISHED CIRCUIT COURT DECISIONS DO CREATE CONFLICTS WITH OTHER PUBLISHED CIRCUIT COURT DECISIONS

Contrary to the Respondents' unsupported assertion, even an unpublished decision of the Ninth Circuit dismissing § 1985(3) claims, still creates a conflict with other published circuit court opinions that refused to dismiss similar claims. See for e.g., the conflict among unpublished circuit court decisions noted by this Court in *Estate of Floyd Cowart v. Nicklos Drilling Co.* (1992) 505 U.S. 469,474, and *Michelman v. Kingswood* (1974) 418 U.S. 902, vacating and remanding an unpublished decision of the Ninth Circuit on petition for certiorari.

The refusal to publish a decision in conflict with other published circuit court opinions is certainly no less a conflict, and may well be of more significance, since it not only denies the Petitioners in this case, but deprives all of the citizens of the Ninth Circuit of a published precedent following the Second, Sixth, Seventh, and Eighth Circuits,

thereby depriving the citizens of the Ninth Circuit of an equal right to prosecute claims against private conspiracies based upon class-based animus that deprive them of the right to vote, recognized in the Second, Sixth, Seventh, and Eighth Circuits.

It is also clear that the lower courts' rulings in this case conflict with the other circuits that recognize that a private conspiracy to discriminate based upon membership in a racial and political class remains actionable under 42 U.S.C. 1985(3), as expressed by this Court in *Griffin v. Breckenridge* 403 U.S. 88 (1971) ("*Griffin*"). For example, the District Court recognized that "these allegations support a finding that Respondents' acts of contributing money were prompted by their political views." AA 8a.

III. PETITIONERS PLEAD SPECIFIC FACTS CONSTITUTING A PRIVATE CONSPIRACY TO BY NON-INDIAN GAMING CORPORATIONS TO DEPRIVE PETITIONERS OF THE RIGHT TO VOTE BECAUSE PETITIONERS ARE INDIANS AND MEMBERS OF A TRIBAL POLITICAL FACTION.

Petitioners' Sixth Claim for Relief in the Second Amended Complaint did specifically allege that Respondents conspired and did overt acts in furtherance of a conspiracy to deprive the Petitioners of their right to vote, because they are Indian, and the Respondents are not, even though the District Court erroneously concluded that the Second Amended Complaint did not sufficiently allege that the Respondents' acts were motivated by racial discrimination, AA 8a. "[Respondents] did the overt acts alleged herein, and...conspiring to deprive [Petitioners] of their...right to

vote, due to their, ...ancestry..." AA 44a, para. 74.

"[Respondents'] overt acts violating ...42 U.S.C. 1985(3), have been coupled with disparaging racial remarks concerning the [Petitioners'] respective degrees of Indian blood, including but not limited to referring to them as "half blood Indians", "a half blood community," and seeking to have them wrongfully evicted from their homes, and denied their possessory rights in their federal benefits." AA 8a, para. 75.

There can be no question that Petitioners have alleged that the Respondents' discrimination is motivated by "racial animus," since it is the Petitioners' very racial ancestry that entitles them to their property and contract rights, from which the Respondents seek to remove them, in addition to the allegations of "disparaging remarks about race." Just as in *Evans v. McKay* (9th Cir. 1989) 869 F.2d 1341, 1344, (even though a §1982 case), the "racial remarks" here, are merely further evidence that the Respondents' overt acts of discrimination were "coupled" with an illegal racial motivation.

Respondents' also totally ignore the fact that allegations of intentional discrimination "due to ancestry," has long been held to satisfy the specific pleading requirements for civil rights violations. *Saint Francis College v. Al Khazraji*, 481 U.S. 604, 613, (1987) (holding that plaintiff could maintain an action under section 1981 for racial discrimination based on plaintiff's status as an Arab). See also, *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18, (1987) (individual may maintain section 1981 claim based on individual's status as a Jewish person); *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1308 (7th Cir.1989) (section 1981 redresses intentional discrimination because of Indian ancestry); *MacDissi v. Valmont Indus.*, 856 F.2d 1054, 1060 (8th Cir.1988) (plaintiff stated viable section 1981 claim by alleging intentional discrimination

based on Lebanese descent).

Similarly, here, the Petitioners have plead overt acts coupled with direct evidence that the Petitioners' conduct was motivated by racial, ancestral animus against those of "one-half degree or more Indian blood." AA 28a, para. 22. Respondents' assertion that Petitioners failed to plead sufficient facts to constitute "racial" discrimination is simply wrong. The Petitioners specifically alleged that the infringement of both their contract and property rights was perpetrated "due to their ancestry." AA 28a, para. 22. That such infringement was purposefully directed at their race is further evident from the fact that the Respondents only discriminated against those of "one-half degree or more Indian blood," who are entitled by virtue of their "race" to the land held in trust by the United States, upon which the Respondents seek to build a casino. AA 23a-24a, para. 7.

Here, the corporate Respondents do not deny that they are operated by non-half-blood Jamul Indians. Nor do they deny that they are alleged to have committed overt acts of racial and ancestral animus toward the half-blood Jamul Indian Petitioners, by paying others to deprive them of their homes and utility contracts. Nor do they deny that the corporate Respondents are alleged to have spent hundreds of thousands of dollars to influence Mexican immigrants and other non-members of the Village, who are not of "one-half degree Indian blood," to vote in favor of evicting the Petitioners from their homes, because the Petitioners are of "one-half degree or more Indian blood."

Such private discrimination clearly falls within the prohibition of unequal treatment, and "shows intentional discrimination on account of race." *Evans v. McKay* (9th Cir. 1989) 869 F.2d 1341, 1344. Just as in *Evans*, the individual corporate Respondents are alleged to have paid non-defendants to discriminate against the Petitioners in an effort "to drive plaintiffs out of business, run them off the

[property], and violate their civil rights."Id., 1344.

It was erroneous for the District Court to find Petitioners' Sixth Claim for Relief "conclusory," where they specifically allege that the Petitioners were deprived of the right to vote because they are Indian, and members of the tribe that politically oppose building a casino, where their homes now stand. Unlike in *King v. State of California* (9th cir. 1986) 784 F.2d 910, 916, cited by the District Court, AA 10a, the Petitioners, here, did not "fail to allege discrimination at all." Nor are Petitioners' claims here conclusory, any more than the claims in *Means v. Wilson* (9th Cir. 1975) 522 F.2d 833, which were found not to be conclusory, since they specifically alleged "defendants conspired and did overt acts in furtherance of a conspiracy to deprive the plaintiffs of their right to vote [in federal tribal elections] because they were supporters of plaintiff." *Means* at 839.

Respondents and the lower courts erroneously ignore the fact that the Petitioners have plead specific facts regarding each Respondent's discriminatory conduct as to each individual Petitioner, in violation of 42 U.S.C. 1985(3).

All four individual corporate Respondents are alleged to have discriminated against all three of the individual Petitioners as follows:

(1) paying money and other valuable consideration reported to be in excess of $100,000 per month to the Plaintiff-Appellants' political opponents contingent upon those individuals depriving the Plaintiff-Appellants of their homes, the benefits of their utility services, and the quiet enjoyment of their usufructuary property rights in their federal benefits and Village assets, including interfering with 30 of the Petitioners' contracts. AA 27a, and 29a-32a.

(2) paying money and other valuable consideration reported to be in excess of $100,000 per month to the

Plaintiff-Appellants' political opponents, to verbally threaten the Plaintiff-Appellants and their children with physical harm, to use racially derogatory and ancestral slurs against the Plaintiff-Appellants to harass and intimidate them, to throw rocks at the windows of Plaintiff-Appellants' houses and vehicles, and to have burned down one of the Plaintiff-Appellants' trailers and set a truck on fire adjacent to another Plaintiff-Appellant's house; AA 26a-27a.

(3) paying money and other valuable consideration reported to be in excess of $100,000 per month to non-members of the Jamul Indian Village with which they have been bribed to attend meetings, in order to vote to bulldoze the Plaintiff-Appellants' homes, and deny Plaintiff-Appellants the equal enforcement of their utility service contracts and usufructuary property rights in their federal benefits and assets of the Village; AA 28a.

(4) paying money and other valuable consideration reported to be in excess of $100,000 per month to the Jamul Indian Village electorate to dilute the vote of the Plaintiff-Appellants with regard to their use and enjoyment of their homes, utility contracts, and usufructuary property rights in their federal benefits and assets of the Village; AA 28a.

Therefore, the Petitioners did not violate the trial court's February 1, 2001 order regarding specificity. SA 14sa. The Petitioners have plead *"specific facts"* regarding each Respondent's discriminatory conduct as to each individual Petitioner. SA 14sa.

F.R.C.P., Rule 8 sets forth the basic rules concerning "specificity" for pleading in federal court. The fundamental requirement imposed by Rule 8 is that all claims or defenses alleged in a pleading shall be set forth in short and plain terms and shall be simple, concise and direct. No technical forms of pleadings are required. In fact, the federal rules require that all allegations be "short and plain." F.R.C.P. Rule 8. The federal rules, for the most

part, also eliminate the need for prolix and technical pleadings. "Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required." F.R.C.P. Rule 8(e)(1).

Unlike the practice in many states, the federal rules do not draw distinctions between pleading facts, ultimate facts, or conclusions of law. Subject to a few exceptions, conclusory allegations are perfectly proper in federal actions. For example, Petitioners need not plead evidentiary facts, or set forth a complete and convincing picture of the alleged wrongdoing to survive a motion to dismiss: "A complaint is not required to allege all, or any, of the facts entailed by the claim." *Bennett v. Schmidt* (7th Cir. 1998) 153 F.3d 516, 518; *Sparrow v. United Air Lines, Inc.* (DC Cir. 2000) 216 F.3d 1111, 1115--"I was turned down for a job because of my race" was sufficient to plead a discrimination claim.

Thus, a complaint will be deemed inadequate "only if it fails to (1) provide notice of circumstances which give rise to the claim, or (2) set forth sufficient information to outline the elements of the claim or permit inferences to be drawn that these elements exist." *Beanal v. Freeport_McMoran, Inc.* (5th Cir. 1999) 197 F.3d 161, 164; *Lewis v. ACB Business Services, Inc.* (6th Cir. 1998) 135 F.3d 389, 405-406.

Federal pleading requirements are extremely liberal. The rules are designed specifically to minimize disputes over pleading technicalities. See F.R.C.P. Rules 1, and 8(f); and *Conley v. Gibson* (1957) 355 U.S. 41, 47-48. Pleadings are construed liberally in favor of the pleader; and in challenging the sufficiency of a complaint, all of its material allegations are taken as true. *Jenkins v. McKeithen* (1969) 395 U.S. 411, 421; *Gilligan v. Jamco Develop. Corp.* (9th Cir. 1997) 108 F.3d 246, 249, Rule 8 contains "a powerful presumption against rejecting pleadings for

failure to state a claim."

In this case, the Sixth Claim for Relief in the Second Amended Complaint has more than sufficiently plead a "short and plain statement," with more than the required specificity, of the Respondents' violation of the Petitioners' civil rights, due to racial and political class based animus, under 42 U.S.C. 1985(3), pursuant to F.R.C.P. Rule 8(a).

IV. CONCLUSION

The decision of the Ninth Circuit Court of Appeals conflicts with the majority of other circuit courts of appeals and district courts to have considered the question in this case. In most circuits which have considered the question, a private conspiracy remains actionable under 42 U.S.C. 1985(3), where it deprives the Petitioners of the right to vote in federal tribal elections because of a combination of "racial and otherwise class-based invidiously discriminatory animus."

Similarly here, the private conspiracy by the non-Indian Respondent gaming corporations should be held liable for depriving the Petitioners of the right to vote because the Petitioners are Indians and members of the political faction opposed to building a casino on the site of their homes.

For all of the foregoing reasons, and particularly since the Respondents appear to concede that the issue Petitioners raise is indeed "the lofty legal issue Petitioners would have this Court address," Brief in Opposition 13, the writ of certiorari to the Ninth Circuit Court of Appeals should be granted.

Respectfully submitted

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